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ABSTRACT

This paper offers a discussion of the rulings of the Federal Communications Commission (FCC) related to Section 315 (a) of the Communications Act of 1934--the section concerning equal access to broadcast media by all political candidates. Following a general discussion of Section 315 (a) and the exemptions that are part of the act, the paper then discusses the reinterpretation of the exemption section known as the "Aspen" ruling. This is followed by a presentation of information about legislative reform that followed the "Aspen" ruling and by suggestions for directions for future reform of the act. The paper concludes by suggesting that while the FCC has responded to the problems in the equal opportunities provision, legislative action is needed to establish broad policies. (TJ)

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POLITICAL BROADCASTING AFTER THE ASPEN RULING: LEGISLATIVE REFORM OF SECTION 315(a)

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Introduction

In 1975, the Federal Communications Commission (FCC) reversed its previous course[1] of limiting the scope of exemptions to Sec. 315 (a) of the Communications Act of 1934, as amended,[2] in response to a petition for clarification of the equal opportunities rule filed by the Aspen Institute's Program on Communications and Society.[3] In doing so, the inhibitory effect on broadcasters that this legislative provision may foster was greatly reduced,[4] although the ruling itself created further interpretive problems.

This article discusses the background of Sec. 315(a), its exemptions, and the aftermath of the Aspen ruling, particularly as it involves further reform in the area of political broadcasting.

I. Sec. 315(a) and its exemptions

Sec. 315(a) requires that a broadcast licensee must afford precisely equal opportunities to all legally qualified candidates for any public office if it permits any candidate for such office a "use" of the station.[5] It is applicable to state and local, as well as Federal elections.[6] "Equal opportunities" includes both free time, if one candidate receives it, or the right to purchase

air time at comparable times and rates[7] if the broadcaster offers the sale of air time to a candidate.[8]

Sec. 315(a) contains four exemptions from the definition of "use": 1) bona fide newscasts, 2) bona fide news interviews, 3) bona fide news documentaries (if the appearance of the candidate is incidental to the presentatior of the subject or subjects), and 4) on-the-spot coverage of bona fide news events. As a result, any program within one of these categories does not trigger an equal opportunities obligation. Rather, the licensee must only provide for a reasonable opportunity for the discussion of conflicting views on issues of public importance that may be raised (i.e., compliance with the general fairness doctrine).[9]

The underlying principles of Sec. 315(a) are twofold in nature, and tend to contradict each other. The first goal of Sec. 315(a) is to provide the public with maximum access to the views of all candidates--that is, promoting the necessary wide-open debate required for an informed electorate under the First Amendment.[10] The second goal is fairness to the political process--a guarantee that broadcasters give equal treatment to those seeking the same office. But in practice, insuring equal treatment for all candidates often has resulted in the licensee's

decision not to broadcast a debate or afford free time for presentations by the major candidates, where there are a number of minor party candidates who would have a mandatory right of free time. To invite a situation where free time requirements could be uncontrolled, and broadcast schedules interfered with, is contrary to the economic interest of the broadcaster. The tendency therefore has been to keep candidate air time to a minimum. Section 315(a) thus has a chilling effect on political coverage and disserves the electorate, since it goes against the First Amendment interest in "an uninhibited marketplace of ideas in which truth will ultimately prevail."[11/]

II. The Aspen ruling

In 1975, the FCC reinterpreted its definition of the bona fide news event exemption of Sec. 315(a) to extend to debates between qualified political candidates initiated by nonbroadcast entities (non-studio debates), and to press conferences conducted by the candidates.[12/] The FCC required that the characterization of these programs as bona fide news events must be based upon a good faith determination by the licensee, and that the broadcaster must not demonstrate favoritism in its presentation of these events.[13/]

The immediate effect of the Aspen ruling was to permit in 1976, as exempt programming, the three broadcast debates between Jimmy Carter and Gerald Ford, and the single broadcast debate between Walter Mondale and Robert Dole. These debates, in accordance with the FCC's interpretation, were staged by a nonbroadcast entity -- the League of Women Voters -- in various nonstudio settings, such as the Palace of Fine Arts in San Francisco. Although the three commercial networks were invited to participate in the planning of these debates, the League of Women Voters clearly controlled the process. It selected the dates and locations of each debate, the format, and the panelists who questioned the candidates. Thus, the role of the networks was limited primarily to remote production and transmission; the exercise of broadcast journalism was preempted by the Commission's requirement that exempt programming in the debate or press conference categories must not involve, to any significant extent, the broadcast licensee.[14/]

Although the airing of these debates was a salutory accomplishment, the staging of similar debates in subsequent elections, particularly at the state and local levels, has demonstrated that the Aspen ruling is, at best, a stop-gap measure until legislative revision takes its place; it is unsatisfactory on several grounds.

First, the ruling does not draw a logical line to establish exempt programming. Thus far, Aspen has been limited to debates or press conferences, but this limitation seems difficult to sustain. Other programming formats -- such as a series of programs featuring candidates discussing the "great issues" of the campaign -- may be equally suitable in informing the electorate. Yet, under present law, a broadcaster cannot block out air time for such programming without triggering the mandatory equal time requirement.[15/] As noted, where there are a multiplicity of candidates (a frequent occurrence at the state and local levels), the broadcaster will probably not plan a series like this because it can create a "floodgate" if all the candidates in the campaign demand equal time. The Aspen ruling should permit a broadcaster to express bona fide news judgment by covering any appearance of a candidate in any campaign, primary or general election. The FCC, to date, has remained silent in this regard.

The practical limitations of the Aspen ruling also demonstrate that it should not be accepted as the best effort toward striking the balance between access of candidates to the airwaves and equality of treatment for all candidates. The broadcaster must assume a passive or reactive role under Aspen; a nonbroadcast entity must first sponsor the event

in a "neutral" setting before the broadcaster can make plans to cover it. Although this may work for awhile on the national level, where groups such as the League of Women Voters have both personnel and money to stage debates in conformance with Aspen, there is no assurance that these resources will continue to be available. At the least, it strains the efforts of nonmedia groups, forcing them to develop expertise and spend significant portions of their budgets. The broadcaster already has the production expertise and the studios, and is the more efficient catalyst for debates. This efficiency rationale is even more urgent in state or local campaigns, where nonmedia entities may be unwilling or unable to assume the major responsibility of producing a series of media debates.

III. Legislative reform after Aspen

The broadest legislative response to the Aspen ruling, of course, would be for Congress to eliminate Sec. 315(a) entirely, so that intrepretive problems regarding exempt and nonexempt programming no longer exist.[16/] Yet this approach would tilt the balance too heavily toward the access rationale, without giving enough attention to the principle favoring equality of treatment among all candidates seeking the same office. Additionally, full repeal would

only shift the standard for resolving disputes in the political broadcasting area: the fairness doctrine would then be used to evaluate, on a case-by-case basis, whether broadcasters presented contrasting viewpoints to candidates receiving air time. Although the broadcaster would receive greater journalistic leeway here, the cumbersome and frequently inconsistent rulings under the fairness doctrine suggest that administrative chaos may well be the most immediate effect of such a reform measure.[17/]

The proposed "rewrite" of the Communications Act,[18/] currently under consideration by the House of Representatives Subcommittee on Communications, had adopted an alternative approach that would key exemptions to Sec 315(a) based upon the office being sought. Under this proposal, the equal opportunities provision would be made inapplicable to all candidates for President, Vice President, United States Senator, or any other office for which a statewide election is held (e.g., Governor, Attorney General).[19/] The theory behind this proposal is that there are many available stations available in such races, and therefore any abuse by a station in "freezing out" certain candidates will have less impact that in a race confined to a small geographic area. While this generally may be true, it does not account for large urban areas (where there are numerous

stations to cover non-statewide races)[20] or sparsely populated states (where there are few stations available to cover statewide races).[21] Additionally, the Federal office that is closest to the voter's geographic interest --the House of Representatives -- is not covered by this plan, since House races are determined in individual districts rather than the state as a whole.

This approach, however, expands the scope of reform that Congress has chosen in the past. In 1960, on a one-time only basis, Congress passed a joint resolution suspending the application of the free time, equal opportunities provision to candidates for President and Vice President, but made clear that the general fairness doctrine remained applicable.[22] This resolution enabled the television networks to make time available for the Kennedy-Nixon debates and proved that suspension of Sec. 315(a) relieved broadcaster inhibitions in granting candidates free time.[23] Politically, this reform measure may be the most acceptable to Congress, since it is based on precedent and is limited to the two most important political races. It would smooth over the inconsistencies of the Aspen ruling, but only as they relate to Presidential and Vice Presidential candidates. Therefore, the resurrection of the limited suspension of Sec. 315(a) is not very meaningful.

A broader approach to restricting the scope of Sec. 315(a) to certain candidates may be more desirable. Here, the emphasis would switch from the office being sought to the importance of the candidacy.

The present equal opportunities scheme applies to all legally qualified candidates. Under many state laws, it is easy for a person to qualify for a place on the ballot, and thus claim the status of a "legally qualified candidate." An abundance of fringe candidates, (e.g., Vegetarian, Prohibition, Socialist Labor)[24/] then provides a disincentive for broadcasters to grant free time to the significant candidates since, except in the case of an exempt program, one appearance will trigger the equal opportunities provision for all other candidates seeking the same office.

Narrowing the definition of a "legally qualified candidate" to significant candidacies would help ameliorate the problem. Such an option should be applied only to free time in general, partisan elections, and not to primaries. For its main basis is a low percentage figure derived from the party's showing in the last election, and that criterion is inapplicable to primaries. Although a percentage figure based on petition signatures could be used,

this is an expensive process that should be generally avoided. As to limiting the restriction to free time, Section 315(a) has caused no practical problems in its application to paid time, and there appears to be no reason, therefore, for denying any candidate the opportunities for equal treatment when paid time is involved.

It is true that not all candidates would be receiving equal treatment when demanding free time, but there appears to be little, if any, benefit from insuring equal treatment for candidates whose public support is wholly insignificant and there is the large detriment of shutting off vigorous debate.[25/] Experience shows that requiring equal opportunities for the fringe party candidates does not get those candidates on the air; rather it results in black-out of all candidates.

A much simpler approach that can be made applicable to both primaries and general, partisan elections would be legislative revision of Sec. 315(a). This course would follow the lead of the Aspen ruling, and would further expand the exempt programming categories.

The outstanding problem -- authority for the networks or stations to produce debates in their studios or present the candidates in a series of broadcasts on the "great issues" -- remains after Aspen.[26/]

In order to remedy this situation, the following exemptions could be added to Sec. 315(a). First, there could be an exemption for any joint or "back-to-back" appearances of candidates. Second, an exemption could provide for any other program of a news or journalistic character which (i) is regularly scheduled; and (ii) in which the content, format, and participants are determined by the licensee or network; and (iii) which explores conflicting views on a current issue of public importance; and (iv) which is not designed to serve the political advantage of any legally qualified candidate. This provision would for the first time allow candidates to appear on journalistic programs like "The Advocates", not to advance their candidacies, but to further discussion of some issue. The fairness doctrine here would provide adequate protection for potential abuses.

These exemptions should cover both primaries and the general election, since debates at each stage can provide valuable information about candidates to the electorate. The obligation to present contrasting viewpoints

under the fairness doctrine would insure that the principle of fairness in the political process is respected.[27/]

Conclusion

As the 1980 elections approach, Congress may wish to take a careful look toward revising Sec. 315(a) of the Communications Act.[28/] The approaches set forth here are not exhaustive; further efforts may arise during the legislative process.

The recipient of Congressional authority under the Act --the FCC -- has already responded, in part, to the problems created by the equal opportunities provision in its Aspen ruling. Although this ruling may be further refined at the agency level, the better approach is revision by Congress, which created Sec. 315(a). Congress is clearly in the best position to establish broad policies concerning political broadcasting, and it can fine tune the delicate balance it sought to establish when it promulgated Sec. 315(a) --a better informed electorate without depriving all candidates the right to express their views over the airwaves.

Notes

1. See The Goodwill Station, Inc. (WJR), 40 FCC 362 (1962); National Broadcasting Co., 40 FCC 370 (1962).

2. Sec. 315(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

   (1) bona fide newscast,
   (2) bona fide news interview,
   (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
   (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

   shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. 47 U.S.C., sec. 315(a)(1975).

3. The Aspen Institute's petition sought revision or clarification of the Commission's policies concerning the applicability of the 1959 amendments to Section 315 to certain joint appearances by candidates -- so that such appearances would be characterized, under a broad remedial construction, as exempt on-the-spot coverage of bona fide news events. CBS filed a separate petition requesting a declatory ruling that Presidential press conferences are exempt from the equal opportunities provision. See Aspen Institute Program on Communications, 55 FCC 2d 697, 698 (1975).

4. See text accompanying n. 15, infra. The Commission's Aspen ruling was sustained by the United States Court of Appeals for the District of Columbia Circuit in Chisholm v. FCC, 538 F. 2d 349 (D.C. Cir. 1976). The U.S. Supreme Court declined to further review the case. See Chisholm v. FCC, cert. denied, 429 U.S. 890 (1976).

5. As a general rule, any "use" of broadcast facilities by a legally qualified candidate imposes an obligation on broadcasters to afford equal opportunities to all other candidates for the same office. Thus, if a candidate's voice or image appears in a readily identifiable manner, even if only for a brief period, a "use" has occurred. See, e.g., Letter to Harry M. Plotkin, 23 FCC 2d 758 (1966); cf. Letter to National Urban Coalition, 23 F.C.C. 2d 123 (1970).

6. See Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959).

7. The Federal Election Campaign Act of 1971 amended Section 315 of the Communications Act of 1934 to require that the charges made for the use of a broadcasting station by any person who is a legally qualified candidate for any public office cannot, during the forty-five (45) days preceding a primary election and during the sixty (60) days preceding a general or special election, exceed the lowest unit charge of the station for the same class and amount of time for the same period. See generally, Licensee Responsibility Under Amendments to the Communications Act of 1971, 47 FCC 2d 516 (1974).

8. Sec. 315(a) does not impose upon any licensee an obligation to allow the "use" of its station by political candidates. But another section, 312(a)(7), does give the FCC authority to revoke a license if a licensee willfully or repeatedly fails to allow reasonable access or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office. See 47 U.S.C §312(a)(7)(1974).

9. Under Sec. 315(a), where the equal opportunities provision is inapplicable, the more generalized fairness doctrine allows the licensee to select the time, format, and spokesperson for presentation of contrasting viewpoints on issues of public importance. See generally, Fairness Doctrine and Public Interest Standards, 48 FCC 2d 1 (1974).

10. See Thomas I. Emerson, Toward A General Theory of the First Amendment (1966), chapter 1.

11. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). See also New York Times v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana 379 U.S. 64 (1964).

12. In doing so, the FCC expressly reversed its prior decisions -- The Goodwill Stations, Inc. and National Broadcasting Co., supra n.2. Both cases had involved broadcast coverage of political debates staged by nonbroadcast organizations, the Economic Club of Detroit and the convention of United Press International, respectively. The Commission held that both programs triggered the equal opportunities provision (i.e., not exempt programming). In Aspen, the FCC stated that it was convinced, as a matter of policy, that the Commission's reversal of these prior decisions was consistent with the original legislative intent revealed in the floor debates on the amendment of Sec. 315 in 1959, and served the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate. Aspen Institute Program on Communications, 55 FCC 2d 697, 706 (1975).

13. Aspen Institute Program on Communications, 55 FCC 2d 697, 708 (1975).

14. Id. at 707.

15. Id.

16. S. 22, 95th Cong., 2d Sess. (1978).

17. Data from the 1978 elections supports the argument that administrative chaos would result if the broader and more time consuming standard of the fairness doctrine replaced the equal opportunities requirement. For example, in September and October of 1978, the final two months of the campaign, the FCC's Complaints and Compliance Division received 2,810 calls from broadcasters requesting help in interpreting the equal opportunities provisions and from candidates complaining about broadcasters. This figure does not include the number of complaints and inquiries received in the mail. Broadcasting, Nov. 6, 1978, p.7.

18. H.R. 13015, 95th Cong., 2d Sess. (1978).

19. Id., Sec. 439.

20. For example, the metropolitan area (ADI) of New York City has 16 television stations, and the Los Angeles ADI has 15 television stations. Broadcasting Yearbook 1978, pp. B-41, 50.

21. In contrast, the entire state of Nevada has 9 television stations, and New Hampshire's total is 8. Ibid., p B-117.

22. See Public Law 86-677, 86th Cong., 2d Sess. (1960).

23. Kennedy and Nixon, for example, received much more free time from networks than Johnson and Goldwater received in 1964, when Sec. 315(a) was again in full force: almost forty hours in 1960 vs. less than five hours in 1964. R. MacNeil, The People Machine: The Influence of Television on American Politics 285-86 (1968).

24. This is not fanciful. In 1960 at the time of Nixon-Kennedy debate and the suspension of the equal time requirement, there were on the ballots in several States, 14 other candidates for the Office of President: C. Benton Coiner, Conservative Party of Virginia; Merritt Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R.L. Decker, Prohibition Party; Farrell Dobbs, Socialist Worker and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party; Eric Hass, Socialist Labor Party, Industrial Government Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitney Harp Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rep. No. 1947, 90th Cong., 2d Sess., 3 (1960). In 1964, the cost estimates were $2,500,000, if the networks agreed to give equal time to seven other candidates because of a telecast by President Johnson. Goldwater v. Federal Communications Commission, Case No. 18963, D.C. Cir., (Br. for Federal Communications Commission, 19). The figure would be much higher today. See also Hearings on H.R. 13721 before House Subcommittee on Communications and Power, 91st Cong., 2d Sess., June 2, 1970, 5 (Statement of FCC Chairman Burch).

25. The views of fringe candidates, of course, would still be presented under the fairness doctrine, but this matter would be within the broadcaster's discretion (e.g., NBC program with all the fringe candidates given five minutes each to state views).

26. The United States Court of Appeals for the District of Columbia Circuit has expanded the FCC's Aspen ruling slightly, so as to permit the later airing of a prerecorded debate or press conference if the program otherwise confirms with Aspen. Office of Communications of United Church of Christ v. FCC, No. 76-1878, D.C. Cir., decided Sept. 11, 1978.

27. The licensee, of course, can affect the public's image of a candidate by its decision as to which candidates are admitted to a debate and which are relegated to later appearances. But this is true today in many situations. See e.g., In re Messrs. William F. Ryan and Paul O'Dwyer, 14 FCC 2d 633 (1968). It is especially true in how much time is devoted to candidacies in the all-important news programs.

28. Revision in this area should be limited to equal opportunities for free time, since Sec. 315(a) has caused no practical problems in its application to paid time.